IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-1789

* * *

KENNETH L. SATTERWHITE,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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INDEX

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STATEMENT

Petitioner was convicted in the District Court of Erath County, Texas, for sexual abuse of a child, and sentenced to confinement in the Texas Department of Corrections for a term of eighteen (18) years. After hearing, his Motion for a New Trial was denied by the trial judge, which judgment was later affirmed by the Texas Court of Criminal Appeals.

One week prior to Petitioner's trial, there appeared on the front page of the Stephenville Empire-Tribune an article entitled "What Makes A Good Juror?". The article included a quotation, attributed to the local district attorney, concerning the relationship of state parole laws and his decision on the length of sentence to seek.

Following his trial, Petitioner presented a Motion For New Trial to the state convicting court. Petitioner presented three of the jurors to testify on his behalf at the hearing on the motion: Mrs. Price, Mr. Clinton Littleton, and Mrs. Marvin Tolar. Mrs. Price admitted reading the article, but unequivocally stated that the jurors had not discussed it. Mr. Littleton testified that, although he had seen the article in the paper, he paid no attention to it. Littleton remembered briefly discussing the article in the jury room but stated that the foreman had asked the jurors not to discuss it again. He could not remember whether the article was discussed after the admonition, but stated unequivocally that the discussion had no effect on his vote and that the final verdict was based on the facts of the case. The third juror, Mrs. Marvin Tolar, stated she had heard the discussion but had not believed what was said, and denied that her vote was affected by the discussion.

The trial judge overruled Petitioner's Motion for New Trial, and his judgment was affirmed by the Court of Criminal Appeals.

REASONS THE WRIT SHOULD BE DENIED

The issue raised by the Appellant in this case is not novel. Appellant eloquently argues that the facts surrounding his case present problems of constitutional dimension which, at present, are unresolved and which have led to conflicting federal and state rulings. Such is not the case, and Respondent submits that the opinion of the Court below is consistent with the decisions rendered by this Court.

Petitioner contends that the state erroneously adopted the standard that Petitioner should bear the burden of proving prejudice arising from reception of extraneous evidence, yet the supporting cases he cites are not on point with the case at bar. Unlike the situation in *United States v. Howard*, 506 F.2d 865 (5th Cir. 1975), no juror

introduced evidence regarding the alleged participation of the defendant in other crimes. Nor was there an ex parte hearing conducted by the Court on an attempted bribe of a juror, thereby depriving Petitioner of knowledge of the extrinsic evidence, as in *Remmer v. United States*, 347 U.S. 227 (1954). Furthermore, there was no state or court official involved in action which placed extraneous evidence before the jury, as in *Parker v. Gladden*, 385 U.S. 363 (1966).

The above cases, unlike the instant case, involved instances where the circumstances and facts surrounding introduction of extraneous evidence were of a nature that the probability of prejudice was so great that due process was presumed lacking. In *Estes v. State of Texas*, 381 U.S. 532, 542-43 (1965), the court stated:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

The instant case clearly does not involve the injection of extraneous evidence into the trial process by either a procedure employed by the State or action on the part of a State or court official. Petitioner implies that this Court's holding in *Parker, supra*, embraces the rule that any jury contact with outside information involves such a probability of prejudice that due process must be presumed to have been denied. To the contrary, as noted in the dissent of Justice Harlan in *Parker, supra* at 368, this Court has firmly rejected the proposition that jurors must be "absolutely insulated from all expressions of opinion." Furthermore, Justice Harlan, citing *Marshall v. United States*, 360 U.S. 310, 312, noted that in cases involving jury contact with outside information, the

Court has preferred to allow "each case . . . (to) turn on its special facts." *Parker, supra* at 368.

The instant case does not involve facts similar to those in *Little v. United States*, 373 F.2d 861, 866 (10th Cir. 1934), where state action was found to deprive the Defendant of the right to a fair trial. Absent such state action, there must be identifiable prejudice, and the mere fact that the jury received extraneous information does not *ipso facto* render Petitioner's trial fundamentally unfair. Petitioner's interpretation of *Parker v. Gladden, supra*, is precisely what Justice Harlan warned against in his dissent when he wrote:

> ". . . though I believe unintentionally, the Court's opinion leaves open the possibility of automatically requiring a mistrial on constitutional grounds whenever any juror is exposed to any potentially prejudicial expression of opinion." *Parker, supra*, at 368.

Clearly the facts of the instant case involve no faulty state procedure nor state action "involving such a probability that prejudice will result," *Estes, supra* at 542, and therefore, the rule of *Stroble v. State of California*, 343 U.S. 181 (1952) and *Irvin v. Dowd*, 366 U.S. 717 (1961), that a substantial showing of prejudice in fact must be made applies.

Respondent submits that the Texas decisions in *McIlveen v. State*, 559 S.W.2d 815 (Tex.Crim.App. 1977) and *Heredia v. State*, 528 S.W.2d 847 (Tex.Crim.App. 1975) reflect that the Texas Court rulings are consistent with those of this Court. Further, Respondent submits that Petitioner has not made a substantial showing of prejudice in fact and, therefore, Petitioner has not been denied due process of law.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, for the reasons set forth above, Respondent respectfully prays that this Petition for Certiorari be in all things denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Dunklin Sullivan, Assistant Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that this 8th day of August, 1978, three copies of the above and foregoing Brief in Opposition were served on counsel for the Petitioner, Garry Lewellen, P.O. Box 652, Stephenville, Texas 76401, by depositing the same in the United States mail, postage prepaid.

DUNKLIN SULLIVAN
Assistant Attorney General